IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 127 of 2003

WITH

CIVIL APPLICATION No 2615 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHREE SAINATH INDUSTRIES

Versus

SAINATH AUTO INDUSTRIES

Appearance:

1. Appeal from Order No. 127 of 2003

MR RR SHAH for Petitioner No. 1

MS JENICE T JHALA for Petitioner No. 1

MR YJ TRIVEDI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 25/03/2004

CAV JUDGEMENT

This Appeal From Order is filed against the order passed by the leaned City Civil Judge below notice of motion application Exh. 6 in R.C.S. No. 5492 of 2000 on 10.03.2003 whereby the interim injunction sought for in the said application was refused.

2. The Appeal From Order was admitted by this Court on 26.09.2003 and rule was issued in Civil Application praying for quashing and setting aside the impugned order and further praying for interim injunction restraining the respondent from using the trade name "SAINATH" in their trade style.

3. It is the case of the appellant / applicant original plaintiff that appellant has filed R.C.S. No. 5492 of 2000 in the City Civil Court at Ahmedabad against the respondent - original defendant for injunction claiming passing off action and also moved notice of motion at Exh. 6 seeking interim injunction restraining the respondent from using the appellant's trade name "SAINATH" or any other similar name.

4. The appellant is a Regd. Partnership Firm carrying on business of manufacturing and marketing of Lubricating Oil Pumps, Water Pumps for diesel and petrol vehicles and parts and accessories thereof etc. at Ahmedabad. The appellant is also manufacturer of and merchant carrying on business, interalia in wide range of Lubricant Oil Pumps, Water Pumps for diesel and petrol vehicles for the last more than 15 years. The respondent is also carrying on the business under the name and style of 'SAINATH AUTO INDUSTRIES" at Hatkanangala, Dist. Kolhapur. The respondent is also manufacturer and merchant in Lubricating Oil Pumps and Water Pumps for diesel and petrol vehicles. The respondent has chosen the identical and/or deceptively similar trade name and trade mark with an intention to pass off its business and goods as and for the business and goods of the appellant. It is the say of the appellant that the business activities carried on by the respondent are unlawful and without consent or license of the appellant. The appellant is having an effective sales network and market set up throughout the country and exports and sale all its goods under the trade name "SHREE SAINATH" for the last 15 years. By virtue of this continuous use of the word "SAINATH", it assumed great significance and importance for the appellant. This word has acquired great popularity and also got its recognition in the public. It is also the say of the appellant that one of

the partners of the respondent earlier firm i.e. Shri Sainath Industries, namely, Mr. Santosh P. Naik, son of Mr. U.P. Nayak was in the employment/service in the appellant's firm for a considerable time from 01.04.1994 to 31.03.1999 and his father, namely, Shri U.P. Nayak was a partner of the appellant firm till he retired on 31.12.1998. The respondent was knowing fully the reputation and goodwill enjoyed by the respondent in respect of the brand trade name/trading style and with a view to trade upon the appellant's tremendous reputation and valuable goodwill, the respondent has chosen the identical and/or deceptively similar trade name and trade mark with an intention to pass off its business and goods as and for the business and goods of the appellant.

5. Mr. R.R. Shah, learned advocate appearing for the appellant submits that the appellant is in this style of business since 1984 and its goods are valuable having the word "SAINATH" printed thereon as a house mark. He has further submitted that as per the Dissolution Deed, Mr. U.P. Naik, the father of Mr. Santosh Naik was not supposed to use the trade name/trade mark, logo of the appellant. In fragrant violation of this understanding and the provisions contained in the Dissolution Deed, the respondent has started using the name "SAINATH" and that has caused confusion amongst all the reputed clients and the customers as well as in the mind of the public at large. He has further submitted that by virtue of using such name, there are all chances of deception and confusion in the trade and it has already caused damage to the appellant and is likely to cause further damage unless the respayment is restrained by a perpetual injunction from using the word "SAINATH" in its trading style/trade name. The appellant has produced the voluminous record to the trial court showing its exclusive use of the word "SAINATH" in all its dealings with its customers and clients and on all its invoices, letter heads, bills, correspondence etc. which have unequivocally proved that the appellant was in prior use of the word "SAINATH".

6. Despite this fact, the learned City Civil Judge has observed that the appellant has failed to prove prima facie case and that the appellant could not claim any exclusive right that except itself nobody should run business under the trade name "SAINATH". The learned City Civil Judge has also committed an error in observing that the appellant has failed to prove that the respondent is selling its goods by making false representation that the goods sold by it are the goods manufactured by the appellant. There was no iota of

evidence or any basis for the learned City Civil Judge to come to a conclusion that the respondent was selling its goods by its clear identity and on the strength of quality of goods. He has further submitted that various authorities relied upon by the appellant before the Trial Court were not considered in their proper perspective and the observations made and conclusion drawn as well as finding given by the learned City Civil Judge are contrary to the facts found and evidence adduced on record as well as the settled legal propositions propounded by this Court as well as by the Hon'ble Supreme Court. The order passed by the learned City Civil Judge therefore, calls for an interference by this Court while exercising the appellate powers and the said order is required to be quashed and set aside and injunction prayed for is required to be granted.

7. In support of his submission, Mr. Shah relied on the decision of this Court in the case of BHARAT TILES AND MARBLE PRIVATE LTD. V/S. BHARAT TILES MANUFACTURING COMPANY, 19 G.L.R. 518. It was observed by this Court in para 12 of its judgment that "the principles are well known and settled by the authorities. The name under which a business trades will almost always be a trade mark and it is also considered difficult, if not impossible, to distinguish between the trading business and a trade name. The Court has further observed that it is no doubt true that where the trade name of an individual business name is geographically descriptive, trade name would not by itself establish a cause for the relief in a passing off action. The aggrieved party has to prove that the use by the rival party of his trading style is calculated to lead to the belief that the business of the rival party is the business of the aggrieved party. The Court has also observed that it is equally significant to note that the name of a business will acquire a goodwill in course of time and the Courts always protect them. The passing off action would certainly lie at the instance of a business man, if his rival carries on his business in the name which is calculated to deceive or which may divert the business from the plaintiff to the defendant or it may occasion a confusion between the two businesses. The Court has therefore paused a precise question by observing that the crux of the problem in passing off action of business or goods is that : "Is a name so nearly resembling the name of another firm as to be likely to deceive?". And that question is to be determined by the Court."

8. Mr. Shah has further relied on the decision of this Court in the case of CIBATUL CHEMICAL INDUSTRIES

PVT. LTD. V/S. CIBATUL LIMITED, 19 G.L.R. 315 wherein this Court has taken the view that "question as regards similarity and likelihood of confusion will have in substance to be decided by the Court on its own assessment as regards similarity and likelihood of confusion. The test to be applied is test of an average person with imperfect recollection. One has to visualize a customer or a tradesman or a citizen who may happen to have dealings with the Company concerned or who may happen to want to purchase the goods manufactured by company concerned. The Court has further observed that when a consumer or customer effects a purchase, he is entitled to be assured of the fact that he is purchasing the very goods that he wants and the goods manufactured by a concern in which he has confidence and not goods manufactured by another concern whom the consumer or the customer does not know and that too by reason of the fact that he is deceived into believing that the product is manufactured by the former, though it is in fact manufactured by the later. Even if, therefore, the defendant company had innocently selected a fancing which is deceptively similar to the name of the plaintiff company, the Court would issue an injunction restraining the defendant company from carrying on its business in the said name."

9. Mr. Shah has relied on the decision of the Delhi High Court in the case of CENTURY TRADERS V/S. ROSHAN LAL DUGGAR AND COMPANY AND OTHERS, A.I.R. 1978 DELHI 250 wherein it is held that "In an action for passing off in order to succeed in getting an interim injunction the plaintiff has to establish user of the mark prior in point of time than the impugned user by the defendants. The Court has further observed that proof of actual damage or fraud is unnecessary in a passing off action whether the relief asked for is injunction alone or injunction, accounts and damages. If there is a likelihood of the offending trade mark invading the proprietary right, a case for injunction is made out."

10. Mr. Shah has further relied on the decision of the Hon'ble Supreme Court in the case of LAXMIKANT V. PATEL V/S. CHETANBHAI SHAH AND ANOTHER, AIR 2002 SUPREME COURT 275 wherein the Hon'ble Supreme Court has observed that "A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquired a reputation or goodwill which becomes a property which is protected by Courts. A competitor initiating sale of goods or services in the same name or by imitating that name

results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury. The three elements of passing off action are the reputation of goods, possibility of deception and likelihood of damages to the plaintiff. The same principle, which applies to trade mark, is applicable to trade name. Passing off cases are often cases of deliberate and intentional misrepresentation, but it is well-settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception." The Court has further observed that "In such a situation, on the plaintiff succeeding in making out a prima facie case, the Court shall have to concentrate on the likelihood of injury which would be caused to the plaintiff in future and simply because the business under the offending name had already commenced before the filing of the written statement or even shortly before the institution of the suit would not make any difference and certainly not disentitle the plaintiff to the grant of ad-interim injunction." The Hon'ble Supreme Court has further observed that the discretion exercised by the Trial Court and the High Court against the plaintiff, is neither reasonable nor judicious. The grant of interlocutory injunction to the plaintiff could not have been refused and after interfering with the discretionary orders passed by the Trial Court and High Court, the Hon'ble Supreme Court has granted interim relief to the plaintiff in that case.

11. Mr. Shah has further relied on the decision of the Bombay High Court in the case of M/s. SIA GEMS AND JEWELLERY PVT. LTD., MUMBAI V/S. SIA FASHION, MUMBAI, AIR 2004 BOMBAY 10 wherein it is held that a suit filed by plaintiff for an injunction restraining the defendant from passing off in the course of trade their goods as those of the plaintiffs by use of the trade name SIA is

maintainable even though the word SIA is a name by which goddess Sita is known and is a common name in India. The trade mark SIA is distinctive for the purpose of passing off action, though it may not have been adopted to distinguish. The Court has further observed that it cannot be said that the word SIA which is a common name cannot be registered under Section 9 of the Trade Marks Act. There is no doubt that under Section 9 a proper name can be registered as a trade mark except or unless the name or one of the names is such as specified under the Emblems and Names (Prevention of Improper Use) Act, 1950.

12. Mr. Shah has further relied on the decision of this Court in the case of DUNCANS AGRO INDUSTRIES LIMITED V/S. SOMABHAI TEA PROCESSORS (P.) LTD., 36 (1) G.L.R. 380 wherein it is held that "A trader who first goes to the market with his product under a particular trade mark or trade name as a distinctive mark, gets the proprietary right to use the mark, to the exclusion of others, irrespective of the length of user or extent of his business." Mr. Shah has further relied on an unreported judgment of this Court delivered on 18.01.1974 in Appeal From Order No. 84 of 1973 wherein it is held that even if the plaintiff's user was only few months prior to that of the defendant, the plaintiff would be entitled to an injunction restraining the defendant from using that mark or a similar mark.

13. Mr. Shah has further relied on the decision of the Delhi High Court in the case of PRAKASH METAL WORKS V/S. SQUARE AUTOMATION (P) LTD., 1991 (2) ARB.L.R. 421 wherein it is held that "in an action for passing off one has to establish the prior user of the trade mark in point of time and that because of the similar and deceptively similar goods being sold under the same trade name, the plaintiff has suffered loss or it has caused damage to his reputation and goodwill. He need not prove actual damage in a passing off action or the actual amount spent for advertisement or on building the reputation and goodwill. The balance of convenience is in favour of the plaintiff. The defendant is restrained from using manufacturing and selling his product under the trade mark 'HOT FLO'."

14. Mr. Shah has further relied on the decision of the Delhi High Court in the case of ROOPAK STORES V/S. RUPAK DEPARTMENTAL STORE, 1999 (2) ARB.L.R. 285 wherein the plaintiff was carrying on its business in the name and style of M/s Roopak Stores. The plaintiff has acquired goodwill and reputation under the said trading

style Roopak Stores. The defendant started business much later in point of time compared to the plaintiff. The word 'Rupak' used as part of the trading style "Rupak Departmental Store" by the defendant is phonetically similar to the word 'Roopak' which is the principal part of the trading style of "Roopak Stores" of the plaintiff-firm. The Court has taken the view that there was a prima facie case to grant the injunction in favour of the plaintiff and that the balance of convenience was also in favour of the plaintiff.

15. Mr. Shah has further relied on the decision of the Hon'ble Supreme Court in the case of WANDER LIMITED AND ANOTHER V/S. ANTOX INDIA P. LTD., 1990 (Supp) S.C.C. 727 for the proposition that "in a passing-off action, the plaintiff's right is independent of such a statutory right to a trade mark and is against the conduct of the defendant which leads to or is intended or calculated to lead to deception. Passing-off is said to be a species of unfair trade competition or of actionable unfair trading by which one person, through deception, attempts to obtain an economic benefit of the reputation which another has established for himself in a particular trade or business. The action is regarded as an action for deceit. The tort of passing-off involves a misrepresentation made by a trader to his prospective customers calculated to injure, as a reasonably forseeable consequence, the business or goodwill of another which actually or probably, causes damage to the business of good of the other trader."

16. Mr. Shah has relied on the decision of the Allahabad High Court in the case of VICTORY TRANSPORT CO. PVT. LTD. V/S. THE DISTRICT JUDGE AND OTHERS, 1981 PTC 1 wherein the plaintiff was doing the transport business under the name and style of "Victory Transport Company (Pvt.) Limited". The defendant had started transport business in the name of "Victory Goods Transport Company". The Court has taken the view that the defendant's name is deceptively similar and likely to cause confusion and hence, the plaintiff was entitled to an interim injunction on the ground that the action was that of infringement and passing off.

17. Mr. Shah has further relied on the decision of this Court in the case of MAHENDRA AND MAHENDRA SEEDS PVT. LTD. V/S. MAHINDRA & MAHINDRA LTD., 2003 (26) PTC 434 (GUJARAT) wherein the plaintiff Company was in diverse business comprising manufacturing of motor vehicles, chemicals, computer software, exports, etc. for more than five decades under the registered trade

name MAHINDRA AND MAHINDRA. The defendant has adopted MAHENDRA AND MAHENDRA PAPER MILLS LIMITED as its name. The words are phonetically and visually and structurally almost identical. The Court has taken the view that the plaintiff's name was not merely descriptive but has become distinctive or acquired secondary meaning in common with its business. The use of those words in the trade name adopted by defendant likely to deceive or confuse the public. There was a prima facie case and balance of convenience was in favour of the plaintiff and if the injunction was not granted, irreparable injury will be caused to the plaintiff. The Court has also taken the view that for maintaining passing off action common field of activity is not a sine qua non.

18. Mr. Shah has further relied on the decision of the Delhi High Court in the case of CIBA GEIGY LTD. V/S. CROSSLANDS RESEARCH LABORATORIES LTD., 1996 PTC 16 for the proposition that it is the duty of the Court to compare the words as a whole and considering the question of similarity in the context of the practice in the trade in question.

19. Mr. Shah has further relied on the decision of the Hon'ble Supreme Court in the case of MIDAS HYGIENE INDUSTRIES P. LTD. AND ANOTHER V/S. SUDHIR BHATIA AND OTHERS, 2004 (28) PTC 121 wherein it was an admitted position that the respondents used to work with the appellants. The advertisements which had been issued by the appellants in the year 1991 at least from that year they were using the Mark LAXMAN REKHA on their products. Not only that but the appellants have had a Copyright in the Marks KRAZY LINES and LAXMAN REKHA with effect from 19.11.1991. The Copyright had been renewed on 23.04.1999. A glance at the cartons used by both the parties shows that in 1992 when the respondent first started he used the mark LAXMAN REKHA in cartons containing colours red, white and blue. No explanation could be given as to why that carton had to be changed to look almost identical to that of the appellant at a subsequent stage. On these facts, the Court had taken the view that this prima facie indicates the dishonest intention to pass off his goods as those of the appellants. The Court has further observed that in the cases of infringement either of Trade Mark or of Copyright normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the Mark was itself dishonest.

20. Mr. Shah has further relied on the decision of the Kerala High Court in the case of NATIONAL GARMENTS, KALOOR V/S. NATIONAL APPARELS, ERNAKULAM, COCHIN, AIR 1990 KERALA 119 wherein it is held that "while considering an application for prohibitory injunction in an action for passing off, the principle applicable for granting interlocutory injunction is slightly different from the principle applicable in ordinary cases. For a temporary order in an action for passing off, the plaintiff need not in general show a strong prima facie case. However the prima facie case that is required to be shown must be something more than a case that will avoid the action being struck out as frivolous or vexatious. Generally stated "even if the chance of success at the trial are only 20 percent" the interim relief sought for is required to be granted. There is another reason for the grant of the interlocutory injunction under such circumstances. Such an order would stop the infringement without delay. Not only that from experience it is clear that a successful motion for interlocutory injunction "normally puts an end to the litigation and the infringement, with a great saving in expense compared with a full trial" and that is the reason why the law insists upon a hearing of such a motion in every case."

21. Lastly, Mr. Shah relied on the decision of Hon'ble Supreme Court in the case of CADILA HEALTH CARE LTD. V/S. CADILA PHARMACEUTICALS LIMITED, 2001 PTC 541 (S.C.) for the proposition that "passing-off action depends upon the principle that nobody has a right to represent his goods as the goods of somebody. In other words a man is not to sell his goods or services under the pretence that they are those of another person. The principle of phonetic similarity has to be jettisoned when the manner in which the competing words are written is different. The products will be purchased by both villagers and townsfolk, literate as well as illiterate and the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. A trade may relate to goods largely sold to illiterate or badly educated persons."

22. Based on the aforesaid authorities and the facts of the appellant's case, Mr. Shah has strongly urged that the Trial Court has committed a grave error of law and of facts while refusing the interim relief to the appellant and hence, the order of the learned City Civil Judge is required to be quashed and set aside and the appellant is entitled for the interim relief as prayed for.

23. Mr. Y.J. Trivedi, learned advocate appearing for the respondent while opposing the present Appeal From Order as well as Civil Application has strongly contended that the appellant has not made out any case for infringement of trade mark or action of passing-off. In action of passing-off, heavy burden lies on the plaintiff to establish its distinctiveness. He has further submitted that the learned Trial Judge has specifically held that no evidence has been produced by the appellant so as to establish that the respondent has committed any breach which may result into an action of passing-off. Mr. Trivedi has further submitted that mark as well as trading style both are different and there is no comparison therein. The trading style cannot be compared with a trade mark. Mere use of the word SAINATH could not give any reputation or distinctiveness to the appellant. As per appellant's own case, the use of the word SAINATH by the respondent was noticed by the appellant in 1998 and suit was filed in 2000. No injunction was ever granted till this date. The products of the respondent are to be sold to automobile industries and they are experts in their respective fields and hence, criteria of imperfect recollections would not apply in the present case. The use of the word SAINATH by the respondent is only because it has got the sentimental value so far as the respondent is concerned. The respondent is carrying on its business at the far away place. Its address is different, territory is different and the state is also different and there is no question of causing any confusion amongst the customers or the consumers. The respondent is selling its products on the basis of the orders so received by the consumers and it is sold as if the goods are that of the respondent and appellant's name is nowhere used by the respondent. The appellant has failed to establish that it has acquired reputation or goodwill and passing-off action is not maintainable unless the acquisition of reputation or goodwill is established.

24. Mr. Trivedi has further submitted that products of respondent and appellant are different and are purchased by well qualified and experienced persons after proper verification of the quality of goods and the goods are also sold in bulk quantity. The monogram Sainath Auto Industries bear two rings in an oblong placed in the invoice, which clearly indicates the difference in origin than that of the appellant. There is no similarity between the label or mark of the appellant with that of respondent because the appellants are using in circular photograph of Saibaba and the device of letter "S" is

placed on the opposite of each other, whereas the monogram of the respondent is quite different and distinct. It cannot, therefore, be said that the respondent has reproduced the artwork of the appellant. The appellant's trading style and the respondent's trading style are totally different and distinct. In the respondent's monogram, it has used the name of the firm as SAINATH AUTO INDUSTRIES in capital letter in broad strip at the bottom of the ring whereas no such feature is there in the appellant's monogram. The purchasers are made by well qualified persons therefore, there is no chance of confusion and deception.

25. Mr. Trivedi has further submitted that appellant has initiated the present proceedings only with a view to haress the respondent and to see that the respondent could not come in the market. The healthy competition cannot be restrained by any order. He has further submitted that there was no misrepresentation ever made by the respondent nor any evidence to that effect was produced by the appellant. Not even a single instance of confusion was sited by the appellant. The authorities cited by the appellant's learned advocate are not applicable to the facts of the present case as some of the authorities are dealing with the cases after trial whereas the present Appeal From Order is at the interlocutory stage and in some of the authorities, the Court has found ample documentary evidence and on the basis of those evidence as well as the facts found, the Court has come to the conclusion and granted interim relief injunction. In some of the authorities, the Court has found a distinctive mark which is not established in the present case. He has, therefore, submitted that the reliance placed on all the authorities cited by the appellant's advocate are uncalled for and none of these authorities would lead to the appellant's case for grant of interim injunction. The Trial Court has considered the authorities cited before it and after having found that the same are not applicable to the facts of the present case, the interim injunction was not granted. In this view of the matter, the order passed by the learned Trial Judge does not call for any interference by this Court and even otherwise, the Appellate Courts are slow in interfering with the order of the Trial Court, especially when the matter is at the interlocutory stage.

26. I have heard learned advocates appearing for the respective parties at length. I have also gone through the record produced before the Trial Court and the pleadings made by the respective parties. The documentary evidence produced before the Court have also

been looked into. Various authorities cited before the Court were also taken into consideration. After having given my anxious thoughts to the submissions made and authorities relied upon by the parties, I am of the view that the impugned order of the Trial Court does require an interference by this Court and that the appellant is entitled to an interim injunction.

27. It is an admitted position that prior to filing of the present suit, the appellant has filed Regular Civil Suit No. 3969 of 1999 against SHRI SAINATH INDUSTRIES, Hatkanangale wherein Notice of Motion was taken out by the present appellant which was granted by the Trial Court and it is still in operation. The interim relief prayed for in the said suit was to the effect that the defendant by himself, his servants, Agents, Dealers and Distributors be restrained by interim injunction of this Court from manufacturing, selling or offering for sale any goods under the trade mark/trade name/trading style "SHREE SAINATH" and/or "SHRI SAINATH" and SS logo and using the word SHREE SAINATH and/or SHRI SAINATH in any manner for trading style or otherwise or advertising any goods bearing the trade mark/trade name/trade style deceptively similar to the plaintiff's trade mark/trade name/trade style/house mark so as to pass-off the defendant's goods as and for the goods of the plaintiff and thereby infringing the copyrights of the plaintiff in the said artistic work in any manner whatsoever under the Copy Rights Act, 1957. The said suit is still pending. It appears that after the interim relief was granted by this Court in the previous suit, the respondent has changed the trade name from SHRI SAINATH INDUSTRIES to SAINATH AUTO INDUSTRIES and when it has come to the appellant's knowledge, the present suit was filed by the appellant against the respondent.

28. It is also an admitted position that the appellant and respondent both are dealing more or less in the same line of business. There is also no dispute about the fact that the appellant firm was established in 1983 and Mr. U.P. Nayak was one of the partners of the said firm till 1998. He retired on 31.12.1998. Not only this, one of the partners of the respondent earlier firm, namely, SHRI SAINATH INDUSTRIES, namely, Mr. Santosh P. Nayak who is the son of Mr. U.P. Nayak was in employment/service in the appellant firm for a considerable time from 01.04.1984 to 31.03.1999. During this period, he came in close contact with the clients, customers and consumers of the appellant firm in or around the area of State of Maharashtra, more particularly to the Kolhapur district. By virtue of

their long association with the appellant firm, an identity was established in the minds of the consumers and customers with them representing the appellant firm. When they started their own business adopting the same trade name and dealing in the same line of business, the consumers and customers of the appellant firm would naturally lead to believe that they represent the appellant firm and this would create a confusion which would adversely affect the business prospects of the appellant firm.

29. There is not much dispute about the fact that the appellant is the prior user of the trade name, namely, SHREE SAINATH and its products are also known in the market under the said trade name. By virtue of this, it has got its own reputation in the market and goodwill in its favour. Prior to filing of the suit, the appellant has given specific notice on 21.02.2000 informing the respondent that the appellant has filed Civil Suit No. 3969 of 1999 in the City Civil Court at Ahmedabad and after hearing, the Trial Court has granted interim injunction in terms of para 19 - (A) & (B) of the injunction application against the respondent. It is further stated that inspite of the said injunction order of the Trial Court, the respondent was using and advertising the said trade name/trading style SHRI SAINATH and SS logo. A copy of the extract from the website is also enclosed along with the said notice. In reply to the said notice, on behalf of the respondent, it was stated that it has stopped using the trade name/trade style and SS logo of the appellant and it has not violated the injunction order passed by the Trial Court. It appears that to get rid of the order passed by the Court, the respondent seems to have changed the name from SHRI SAINATH INDUSTRIES to SAINATH AUTO INDUSTRIES. The appellant has also produced the details of sales figures right from 1984 - 85 to 1998 - 99 which shows progressive increase of the sales figure. The appellant has also produced certain sales invoices raised on Mahindra & Mahindra Ltd.,Bombay, Shree Ram & Sons Bombay, Premium Automobiles Limited, Tempo Spares, Bombay which would show that these are the regular customers of the appellant. The appellant has also produced one letter from Mahindra & Mahindra Limited dated 25.10.2000 addressed to M/s. Sundaram Fasteners Ltd., Bangalore wherein it was mentioned that they are in the process of developing the subject oil pump with M/s. SAINATH AUTO INDUSTRIES Kolhapur as an additional source and they have also recommended the said SAINATH AUTO INDUSTRIES to use their motors for the subject pump assembly, to be supplied by them. It shows that the effect of their

approach to the customers of the appellant under the trade name of SAINATH AUTO INDUSTRIES would adversely affect the business prospects of the appellant.

30. In the above view of the matter, it prima facie appears to the Court that the respondent has selected the name of SAINATH AUTO INDUSTRIES only with a view to cause confusion in the minds of the customers and it looks like so deceptively similar that the customers would lead to believe that the goods sold by them were that of the appellant. Thus, in the present case, all the three essential ingredients for an action of passing-off are present, namely, prior use, establishment of goodwill and reputation and chance of future loss by virtue of the use of such deceptively similar trade name or device. The appellant has, therefore, a prima facie case in its favour. Balance of convenience is also in its favour and if the interim injunction is not granted in favour of the appellant, it may cause future loss to the appellant. Ultimately on the objective scrutiny of the records and documents, the Court would have to come to a conclusion, may be based on subjective satisfaction as to whether the respondent is liable for an action of passing-off or as to whether the appellant is entitled to an interim injunction and if an answer to this question is in the affirmative, there is no reason to deny this interim injunction to the appellant.

31. In the above view of the matter, present Appeal From Order is allowed. The impugned order passed by the Trial Court is hereby quashed and set aside and the interim injunction prayed for by the appellant in notice of motion application Exh.6 in R.C.S. No. 5493 of 2000 is hereby granted restraining the respondent from using the trade name SAINATH in their trading style. Rule is made absolute in Civil Application No. 2615 of 2003. There shall be no order as to costs.

[K.A. PUJ, J.]

#Savariya#

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